TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 864. 106.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 22, 1896.

(16,154.)

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1

In the Court of Claims.

THE NEW YORK INDIANS, Being Those Indians who were Parties to the Treaty of Buffalo Creek, New York, on the 15th Day of January, A. D. 1838, } No. 17861.
vs.
THE UNITED STATES.

I.—*Petition. Filed February* 10, 1893.

The petition of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, of the 15th day of January, A. D. 1838, namely, the New York Indians in the States of New York and Wisconsin, including the Seneca nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge and Munsee tribes of Indians, respectfully represents:

1. The claimants were parties to the treaty between the New York Indians and the United States, concluded on the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, being the same Indians mentioned and described in the certain act of Congress, public No. 34, 52d Congress, second session, approved January 28th A. D. 1893, hereinafter more specifically mentioned and referred to.

2

2. On the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, there was concluded between the claimants and the United States a treaty known as the treaty of Buffalo Creek, wherein and whereby it was provided, in consideration of the premises therein recited, and of the covenants contained in the treaty itself to be performed by the United States, that the claimants ceded and relinquished to the United States all their right, title and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States in by the said treaty, agreed and guaranteed as follows:

First. To set aside as a permanent home for all of the claimants, a certain tract of country west of the Mississippi river, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in the certain schedule annexed to the said treaty, and designated as Schedule A, on condition that such of the claimants as should not accept, and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest to the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new

homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

hirdly. The United States agreed that the lands secured to the mants by the treaty should never be included in any State or ritory of the Union.

ourthly. The United States agreed to pay to the several tribes nations of the claimants, hereinafter mentioned, on their removal st, the following sums respectively, namely: To the St. Regis e, five thousand dollars ($5,000); to the Seneca nation, the in- e annually of one hundred thousand dollars ($100,000), (being t of the money due said nation for lands sold by them in New rk, and which sum they authorized to be paid to the United tes); to the Cayugas, twenty-five hundred dollars ($2,500) in cash, l the annual income of twenty-five hundred dollars ($2,500); to Onondagas, two thousand dollars ($2,000) in cash and the an- l income of twenty-five hundred dollars ($2,500); to the Oneidas, thousand dollars ($6,000) in cash, and to the Tuscaroras, three usand dollars.

ifthly. The United States agreed to appropriate the sum of four ndred thousand dollars ($400,000), to be applied from time to e by the President of the United States for the following pur- es, namely: To aid the claimants in removing to their new homes l supporting themselves the first year after their removal; to en- rage and assist them in being taught to cultivate their lands; aid them in erecting mills and other necessary houses; to aid em in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired but re exempted from obligation so to do.

The treaty of Buffalo Creek having been duly assented to by all e parties thereto, was afterwards on, to wit, the 4th day of April D. 1840, duly proclaimed; and certain disputes thereunder ving arisen, it was afterwards modified in some particulars not ving reference to the matter of this claim, and as so modified was ain proclaimed on, to wit, the 26th day of August, 1842.

3. At the time of the making of the treaty of Buffalo Creek afore- id, and for many years prior thereto, the claimants owned and upied valuable tracts of land in the State of New York, and had proved and cultivated the same and resided thereon, and from e products thereof chiefly sustained themselves.

4. The President of the United States never prescribed any time r the removal of the claimants, or any of them, to the lands, or y of them, set apart by the treaty of Buffalo Creek, and no provis- n of any kind was ever made for the actual removal of more than bout two hundred and sixty individuals of the claimant tribes, as ntemplated by the said treaty; and of this number only thirty-two ver received patents or certificates of allotment of any of the lands entioned in the first article of the said treaty and the land allotted

to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

5. After the conclusion of the said treaty of Buffalo Creek the United States surveyed and made part of the public domain
5 the lands at Green Bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

6. The lands west of the Mississippi river, secured to the claimants by the said treaty of Buffalo Creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation and so remained until in, or about the year A. D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the State of Kansas. The said lands at the time the same were so appropriated by the United States, were of great value, to wit, of the value of one dollar and twenty-five cents ($1.25) per acre and upwards.

7. The action of the United States in appropriating the said lands as aforesaid, was in pursuance of the proclamation of the President of date December 3d and 17th, 1860, and grew out of an order of the Secretary of the Interior of the 21st day of March, A. D. 1859; and between the said last-mentioned date and the proclamation of the said lands aforesaid, the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof; and the claimants have steadily since asserted said claim in the premises.

6 8. Of the sum of $400,000 agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes aforesaid only the sum of $20,477.50 was ever so appropriated, except as hereinafter stated; and of this sum only $9,464.08 was actually expended.

9. By treaty with the Tonawanda band of the Seneca nation claimants herein, which said band numbered 650 individuals, the United States on November 5th, 1857, in consideration of the release by the said band of its claims upon the United States to the lands west of the Mississippi river, all right and claim to be removed thither and for support and assistance after removal and all other claims against the United States under the treaties of 1838 and 1842 (reserving certain rights not material to be considered in the premises), agreed to pay and invest, and did pay and invest for said band the sum of $256,000; which payment and investment amounted in substance to compensating the members of the said band at the rate of one dollar per acre for their claims to the lands in Kansas under said treaty, and also their proportionate share of the sum of $400,000 aforesaid, to wit, 208,000 acres of land and $48,000 of the said sum of $400,000.

10. The certain sum of $100,000, the income of which as aforesaid

the United States agreed to pay annually to the Seneca nation, has heretofore been paid and invested or an adjustment has been had in relation thereto between the said Seneca nation and the United States to the satisfaction of the said nation, and there now remains to the said nation no claim upon the United States in respect thereof.

7 11. On June 21st, A. D. 1884, in accordance with the provisions of the act of March 3, A. D. 1883, entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," the claims of the claimants in the premises, together with the vouchers, papers, proofs and documents appertaining thereto, were referred to this court for investigation and determination of the facts involved. The said claims were thereupon duly presented to this court, the same being known upon the records thereof as congressional case No. 151, and upon consideration thereof this court duly found and returned to the Senate, conformably to law in that behalf, its findings of fact as aforesaid, the same being set forth in Senate Miscellaneous Document No. 46, Fifty-second Congress, first session, and being the findings mentioned and described in the said act, approved January 28th, 1893, aforesaid.

12. Thereafter, by act approved January 28th, 1893, being public No. 34 of the acts of the Congress of the United States of the Fifty-second Congress, second session, the claims of the claimants in the premises were again referred to this court for final adjudication, which said act is as follows:

"An act to authorize the Court of Claims to hear and determine the claims of certain New York Indians against the United States.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties

8 to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States. In the hearing and adjudication of said case said court may proceed upon the finding of facts already made, upon reference of said claim to said court, filed on the 11th day of January, 1892, and transmitted to Congress by John Randolph, assistant clerk of said court, on the 16th day of January, 1892. Or said court may, if in its opinion justice so requires, take other testimony as to the facts. But in any judgment it may render against the United States, in favor of said claimants, interest shall not be allowed. The statute of limitations shall not be pleaded as a bar to recovery in said case. The Attorney General is hereby directed to appear in behalf of the United States in said case. And from any judgment rendered by the court, either party may appeal to the Supreme Court of the United States. Said cause shall be advanced on the docket and tried without delay in any court which shall be-

come invested with jurisdiction thereof by the provisions of this act.

Approved, January 28, 1893."

And the claimants file this their petition in conformity therewith.

13. The parties interested in this claim are the Seneca nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge and Munsee tribes of New York Indians, as enumerated in the Schedule A aforesaid, and their descendants, except the Tonawanda band of Senecas, who were, as aforesaid, provided for by the treaty of November 5th, 1857, as aforesaid; and no assignment of said claim or any part thereof or interest therein has been made. And the claimants have never in any way voluntarily aided, abetted or given encouragement to rebellion against the Government
9 of the United States, and they are justly entitled to the amount claimed in this petition after allowing all just credits and offsets.

14. The premises considered, the claimants claim and demand of the United States as follows:

For 1,605,760 acres of land at $1.25 per acre	$2,007,200 00
Balance of the above-mentioned sum of $400,000, after deducting the $48,000 paid to the Tonawanda band as aforesaid	352,000 00

The various sums so as aforesaid agreed to be paid in cash to separate tribes of the claimants as follows:

To the Cayugas.....	$2,500 00	
To the Onondagas.....	2,000 00	
To the St. Regis tribe	5,000 00	
To the Oneidas.....	6,000 00	
To the Tuscaroras	3,000 00	
		$18,500 00

To the income so as aforesaid agreed to be paid to certain of the said tribes as follows:

To the Cayugas the annual income of $2,500, from the date of the proclamation of the said treaty to the filing of this petition, to wit, fifty-three years..	$7,950 00
To the Onondagas, the annual income of $2,500 from the date of the proclamation of the said treaty to the filing of this petition, to wit, fifty-three years.	7,950 00

10 The claimants, therefore, demand judgment in their favor against the United States for the sum of $2,393,600, and that the same be distributed and divided by the judgment and decree of this court to and among the claimants as follows:

The Seneca nation, the Oneida, Onondaga, Tuscarora, Cayuga and St. Regis tribes of New York, and the Oneida, Stockbridge,

Brothertown and Munsee tribes of Wisconsin respectively, in the ratio and on the basis of the number of individuals in each of said nation or tribes as the same existed at the time of the making said treaty of Buffalo Creek, as shown by and mentioned in said Schedule A, to the said treaty aforesaid, which is as follows (excepting therefrom the 650 Senecas of the Tonawanda band aforesaid), that is to say:

Senecas (2,309 less 650)	1,659
Onondagas, with the Senecas	194
Cayugas	150
Onondagas at Onondaga	300
Tuscaroras	273
St. Regis	350
Oneidas at Green Bay	600
Oneidas in New York	620
Stockbridges in New York	217
Munsees	132
Brothertowns	360

And the claimants pray for such other and further relief and judgment in the premises as to the court may seem proper.

GUION MILLER,
Att'y of Record.

HENRY E. DAVIS,
GEORGE BARKER,
JAMES B. JENKINS,
JONAS H. McGOWAN,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Before me, assistant clerk of the Court of Claims of the United States, personally appeared Guion Miller, who being first duly affirmed, deposes and says that he is one of the attorneys of the claimants mentioned in the foregoing petition, as in and by the power of attorney in that behalf on file in the congressional case No. 151, in the Court of Claims of the United States, appears; that he has read the said petition and knows the contents thereof and that the statements therein made are true to the best of his knowledge and belief.

GUION MILLER.

Subscribed and affirmed to before me this 10th day of February, A. D. 1893.

(Signed) JOHN RANDOLPH. [SEAL.]
Ass't Clerk, Court of Claims.

11 II.—*Traverse. Filed February* 6, 1894.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies

each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law. Filed January 6, 1896.*

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that State.

The court decide that the Indians described in the jurisdictional act sending this case to this court as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.

II.

Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their Western brethren with the privilege of removing to and occupying the same, without changing their existing relations and treaties with the Government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendants aided some ten Indians representing plaintiffs in exploring certain parts of Wisconsin with a view to making arrangements with the Indians residing there for a portion of their country, to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas, and Oneida nations of New York Indians.

13 August 18, 1821, the Menomonie and Winnebago nations, in consideration of $2,000, chiefly in goods, ceded, released, and quitclaimed all their right, title, and claim in certain lands near Green Bay, Wis., amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge, and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge, and Munsee nations, of the one part, and the Menomonies and Winnebagoes of the other, is approved, with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge, and Munsee nations are to be held by them in the same manner as they were previously held by the Menomonies and Winnebagoes.

JAMES MONROE.

February 19, 1822.

The $2,000 above mentioned was thus paid: In goods, $900 from the Stockbridges, $400 from the Oneidas, $200 from the Tuscaroras; in cash, $500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

III.

Permission to secure an extension of the cession in the preceding finding recited was given by the Secretary of War, and thereafter, on September 23, 1822, the Menomonies, in consideration of $3,000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined (adjoining the above), to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, the releasees promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon bay, Green bay, Fox river; that part of the former purchase made by said tribes or nations of Indians of the Menomonie and Winnebago Indians on the 8th August, 1821, which lies south of Fox river and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon bay, and no further, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the Government has assented, are to be held by

them in the same manner as they were held by the Menomonie previous to concluding and signing the aforegoing instrument, an that the title which they have acquired is not to interfere in an manner whatever with the lands previously acquired or occupied b the Government of the United States or its citizens.

October 27, 1823, the Secretary of War officially notified the re leasees that the President distinctly wished them to understand tha by this partial sanction he did not mean to interfere with, nor i any manner invalidate, their title to all the lands which they ha thereby acquired, including those not confirmed by the Goverr ment, but, on the contrary, he considered their title to every part c the country conveyed to them by the releasors as equally valid a against them; and that what they had done was with the full assen of the Government.

14 Of the consideration above mentioned, $1,000 were paid b the Stockbridges and Munsees, while $1,000 were to be paic by the Oneidas, Tuscaroras, and St. Regis in one year from Septem ber 23, 1822, and $1,000 in two years from that date. Of the tw latter amounts $1,000 appears to have been paid by the Unitec States out of the funds of the St. Regis about 1825, while $950 wer paid by the Brothertown tribe September 18, 1824. In considera tion of which the releasees, by an agreement with the Brothertowns under date of January 8, 1825, ceded to them a small separate trac by metes and bounds, and, after reserving to themselves, for eacl tribe of the releasees, a similar tract from out of the country pur chased from the releasors, granted to the Brothertowns an equal undivided part of all the remaining portion of said purchase. I does not appear whether the Oneidas and Tuscaroras paid any par of the above consideration.

IV.

The grants set forth in findings II and III include the lands sub sequently ceded by the Menominees to the United States by the treaties of August 11, 1827, and February 8, 1831.

V.

Thereafter some New York Indians belonging to the Oneida, St Regis, Stockbridge, Munsee, and Brothertown tribes removed to and took possession of the lands in Wisconsin.

Later and after 1832 another small portion of the New York In dians removed to the Wisconsin or Green Bay lands.

March 14, 1840, the Senecas denied ownership of Wisconsin lands, stating that they determined to have no other home than that of their fathers where they then resided, and in May and September following, in petitions to the President, the Senate, and the House of Representatives, their council denied that they were parties to the treaty.

VI.

It does not appear that application was made by the tribes or bands or any of them to the Government for removal to the Kansas

provided for in the Buffalo Creek treaty except as hereafter
rs in these findings.
oes not appear that any substantial number of Indians wished
to Kansas other than those who made up the Hogeboom party
.

VII.

he year 1838, at the time of the negotiation of the treaty of
o Creek, the Senecas, the Onondagas, the Oneidas, the Cayu-
ne Tuscaroras, and the St. Regis each possessed a reservation
d in the State of New York on which members of the tribes
d and the right of occupancy of which was secured to them
aty stipulations. The Cayuga Indians had no separate reser-
n of their own in the State of New York, but made their home
nd resided upon the reservation and lands possessed by the
nation; this they did with the consent of the Senecas, and
ion of the Onondagas did the same.

VIII.

lands occupied by the Senaca nation in the State of New
consisted of four separate and distinct reservations, namely:
Buffalo Creek reservation in Erie county, containing 49,920
the Cattaraugus Creek reservation, containing 21,680 acres;
lleghany reservation, containing 30,469 acres, and the Tona-
reservation, in Genesee county, containing 12,800 acres.
nds occupied by the Tuscarora Indians were situated in Ni-
county, N. Y., and comprised 6,249 acres. The lands occu-
by the Onondaga tribe were situated in Onondaga county,
and comprised 7,300 acres. The lands occupied by the Oneida
were situated in Oneida and Madison counties, N. Y., and
ised 400 acres. The reservation and lands occupied by the
gis tribe were situated in Franklin county, N. Y., and com-
about 14,000 acres.

IX.

many years prior to the treaty of Buffalo Creek (of 1838)
nations or tribes of Indians had improved and cultivated their
on which they resided and from the products of which they
sustained themselves.
treaty of Buffalo Creek, as printed in the seventh volume of
atutes at Large, contains a misprint on the third line of page
The word "Oneidas" is in the original treaty "Onondagas,"
hole line reading, "Ononadagas residing on the Seneca reser-
."

X.

Extract from Executive Journal of June 11, 1838.

Senate resumed, as in Committee of the Whole, the consider-
of the treaty with the New York Indians, and the article sup-
ntal thereto.

n motion of Mr. Wright, and by unanimous consent, the ques-
was taken on agreeing to the amendments reported from the
mittee on Indian Affairs, and determined in the affirmative,
33.

* * * * * * *

o further amendments having been made, the treaty was re-
ed to the Senate, and the amendments were unanimously con-
ed in.

r. White then submitted the following resolution of ratification,
racing the amendments as reported from the committee and
pted by the Senate:

esolved (two-thirds of the Senators present concurring), That the
ate advise and consent to the ratification of the treaty made and
cluded at Buffalo Creek, in the State of New York, the 15th day
anuary, in the year of our Lord 1838, by Ransom H. Gillett, a
missioner on the part of the United States, and the chiefs, head
, and warriors of the several tribes of the New York Indians,
mbled in council, with the following amendments:

trike out of article 2, after the word "computed," in line 29
e 18, art. 2, 7 Stats., 551), the following words:

To have and hold the same in fee-simple forever, by patent from
President of the United States, with full power and authority
livide the same among the members of the different tribes, in
eralty, with power and authority to sell among each other and
ir Indian brethren of the Indian Territory, under such laws and
ulations as may be adopted by the respective tribes themselves,
y a general council of the New York Indians."

nsert the following in lieu of the above stricken out:

To have and to hold the same in fee-simple to the said tribes or
ions of Indians, by patent from the President of the United
tes, issued in conformity with the provisions of the third section
of the act entitled 'An act to provide for an exchange of lands
with the Indians residing in any of the States or Territories,
and for their removal west of the Mississippi,' approved on
28th day of May, 1830, with full power and authority in the
l Indians to divide said lands among the different tribes, nations,
ands of New York Indians, or among the members of said
es, nations, or bands, in severalty, with the right to sell and con-
to and from each other, under such laws and regulations as
y be adopted by the respective tribes, acting by themselves, or
a general council of the said New York Indians, acting for all
tribes collectively."

Strike out in line 45, of the 2d article, (line 3, 7 Stat., 552), the
rds "and at Green Bay."

Strike out after the word "annexed," in line 48, the residue of the
article, in the following words:

It is further agreed that if the United States, by any future
angement, can procure the Cherokee tract lying between the
ige lands and the State of Missouri, that then the New York
lians shall have the same, and a like quantity is to be taken off
western end of the tract herein set apart for the New York

Indians. And in order to convince the New York Indians of the great desire of the United States to gratify their wishes, it is agreed that the President shall invite a delegation of the Cherokees, and also a delegation of the New York Indians, to assemble at the city of Washington to participate in the negotiations for the said Cherokee country, the expense of which shall be borne by the United States. It is agreed that the New York Indians shall confer on their delegates such powers as shall be necessary to relinquish the lands proposed to be given in exchange with the Government for the Cherokee lands, and such other powers as each tribe may confer, relating to the interest of itself."

Strike out the third, fourth, fifth, and sixth articles, in the following words:

"Article 3. The United States stipulate and agree to remove all the New York Indians of the several tribes described in the foregoing article to their new homes and to supply them with provisions for one year after their arrival there. But if any chief, who shall be, in the opinion of the agent, competent to take care of and remove himself and family in his own conveyance or otherwise, wishes to do so, he shall be allowed that privilege, and he shall be allowed the same compensation for each person so removed as it would cost the United States, which shall not be less than twenty dollars for each person so removed. And any chief who shall be, in the opinion of the agent, competent to act as a subagent in the removal of his party, and does actually remove them, shall be paid at the rate of five hundred dollars for every party of one hundred persons so by him removed, and in the same ratio, be the number more or less. It is understood that when any chief gives notice to the agent of the Government that he and his party are ready to remove, that the means shall be furnished for that purpose by the Government, and a disbursing agent shall accompany them. It is further agreed that such Indians as prefer to remove by land with their own conveyances shall be permitted to do so, and those who are removed by the Government shall have every attention paid to their health and comfort, by having good and sufficient conveyances for their accommodation, and a physician to accompany each party of emigrants, if they desire it. It is agreed that the Indians shall be permitted to commute their one year's support for such a sum as the rations would cost the Government at their new homes.

"Article 4. It is further agreed that the United States will erect in the country set apart for the New York Indians, for the use of the respective nations, as many council-houses, churches, school-houses, saw-mills, grist-mills, and blacksmith shops, not to exceed one for each nation, except where otherwise specially provided, as shall be necessary and desired by the said nations. But in case any portion of any tribe removes then a proper proportion of the above-mentioned buildings are to be erected. It is further agreed that the United States shall pay suitable teachers, millers, and blacksmiths, and furnish the necessary coal, iron, steel, and blacksmith's tools, for ten years, and as much longer as the President shall deem proper.

"Article 5. It is expressly agreed that if, in the opinion of the P
dent of the United States, he shall hereafter deem it proper to lo
the seat of government for the Indian Territory within the terri
set apart for the New York Indians, that then he shall be at lib
to select a tract, not to exceed a township, for that purpose, wh
shall be excepted from the foregoing grant and remain the
property of the United States; and there shall be added to
territory set apart for the New York Indians a quantity of l
which shall be equally valuable.

"Article 6. The United States, taking a deep interest in the
provement of the Indians in useful knowledge, and believing t
a literary institution for their instruction in the higher branche
education, to be established in the Indian Territory, will be hig
beneficial to the Indians, hereby stipulate to set apart for that p
pose as a permanent fund the sum of thirty thousand dollars, t
invested in some safe stock by the President of the United Sta
the income of which shall be applied to the purchase of
17 necessary books and apparatus and the support of suita
teachers, who shall always be selected from among
Indians themselves, if persons of the necessary qualifications
be found among them. It is understood that this institution sh
be organized under such rules and regulations as the Presiden
the United States shall from time to time prescribe, and to
established at such place as shall be finally selected as the sea
government of the Indian Territory, if that shall be located wit
the country assigned to the New York Indians; and if not, t
the said institution shall be located at such place in said country
shall be determined in a general council of the New York Indi
residing there."

Strike out of article 8, after the word "Territory" in line 21 (
line of art. 4, 7 Stats., 552), the following words:

"It is expressly understood and agreed that if any of the seve
tribes of New York Indians shall suffer depredations from any ot
Indian tribes residing in the Indian Territory, or from citizens
the United States, and the same is proved to be the case to the s
isfaction of the agent residing among them, and the property ca
not be recovered, nor satisfaction therefor obtained by such ag
that then the United States will pay the Indians so sustaining su
loss for the same."

Strike out the ninth article, in the following words:

"Article 9. The United States agree to pay to the New York
dians at their new homes, each year, for five years, ten thousa
dollars, in farming utensils, looms, and spinning wheels, and
money to support proper persons to instruct them in the use of t
same, and in domestic animals, under such regulations as shall
prescribed by the President of the United States. The rejection
this article by the Senate shall not invalidate the residue of t
treaty, and the Senate shall be at liberty to modify and alter t
article as they shall deem proper."

Strike out of the 11th article, in lines 5, 6, and 7 (art. 6, 7 Sta
552), the following words:

"And the Government will have one of its agents reside among the New York Indians at the West."

Strike out of the 14th article, after the word "beginning," in line 19 (last line of art. 9, 7 Stats., 553), the following words:

"But if the President and Senate shall not ratify and confirm this reservation, then the said Williams is to receive, in lieu thereof, ten thousand dollars, and have the preemption right to purchase the said lands at Government price."

Strike out of the 15th article, after the word "accommodation," in line 8 (line 9, art. 10, 7 Stats., 553), the following words:

"But in case the Cherokee tract, lying east of the Osages, is obtained by the United States, that then the Senecas are to have that tract, and so much north of it, of the country set apart for the New York Indians, as shall be necessary to make the requisite quantity for them and their friends, the Cayugas and Onondagas, residing among them;" and

Strike out of the 15th article, all after the word "Fellows," in line 36 (last line of art. 10), in the following words:

"The United States also agree to build, at their new homes, for the Senecas, and their friends, the Cayugas and Onondagas, residing among them, four saw-mills and four grist-mills, four council houses, four school-houses, four churches, if they desire it, and three blacksmith shops, and one gunsmith shop, and also to provide and pay the necessary millers, teachers, and blacksmiths, and a gunsmith, for ten years and as much longer as the President of the United States shall deem proper, and the United States will also supply the necessary blacksmith tools, iron, steel, and coal for said shops during that period. It is expressly understood that the gunsmith is to do all the work for all the New York Indians who remove West and reside at their new homes."

Strike out the 19th article, in the following words:

"*Special Provisions for the Oneidas at Green Bay.*

"Article 19. The United States agree to pay the sum of three thousand dollars to the Orchard party of the Oneidas, at Green Bay, and the sum of thirty thousand five hundred dollars to the first Christian party settled at that place, as a remuneration for money laid out and expended by the said parties, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and the removal to the same; the same to be apportioned and paid out to the several claimants by the chiefs and a United States commissioner as may be deemed most equitable and just. It is expressly agreed that if the Senate of the United States does not ratify and confirm the above, in relation to the Green Bay Indians, it shall not invalidate any of the other provisions of this treaty. It is expressly agreed that if any of the Indians now at Green Bay wish to remove to the country set apart as their future homes, they shall be at liberty to do so, and on relinquishing their possessions and improvements to the United States, they shall be paid the value

of said improvements; and when a sufficient number of
18 Indians remove to their new homes to need them the U
States will make the provisions for this part of the On
separate from those at Oneida, if they desire it, which are spec
in article fourth of this treaty. This article shall not be const
to authorize the Government to compel them to remove."

Change articles 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 2
articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, respectively.

Add the following as a new article:

"Article 15. The United States hereby agree that they wil
propriate the sum of four hundred thousand dollars, to be ap
priated from time to time, under the direction of the Presider
the United States, in such proportions as may be most for th
terest of said Indians, parties to this treaty, for the following
poses, to wit: To aid them in removing to their new homes
supporting themselves the first year after their removal; to enc
age and assist them in education and being taught to cultivate t
lands; in erecting mills and other necessary houses; in purcha
domestic animals and farming utensils, and acquiring a knowl
of mechanic arts."

Strike out Schedule D, in the following words:

"SCHEDULE D.

"The United States will pay to the persons named below
sums mentioned for them, as a remuneration for their service
procuring the Green Bay country and for services as delegate
exploring the western country, and for losses sustained in co
quence thereof, and for other services, to wit:

"To George Jameson, two thousand dollars.
"To Thompson S. Harris, twelve hundred dollars.
"To Nathaniel S. Strong, one thousand dollars.
"To Seneca White, one thousand dollars.
"To Marus B. Pierce, one thousand dollars.
"To William Johnson, one thousand dollars.
"To James Young, one thousand dollars.
"To William King, five hundred dollars.

"The above-mentioned sums to be paid to the persons named
the settling at their new homes at the West.

"To William Patterson, Israel Jemeson, Little Johnson, Wh
Seneca, Silver Smith, Baptiste Pawlis, Jonathan Jourdan, Mar
Daney, John Anthony, Honyost Smith, Henry Jourdan, Jar
Cusick, and James Young, each the sum of two hundred dollars
be paid, when an appropriation is made, to the persons mention
first deducting the following sums which have been already a
vanced to them by J. F. Schermerhorn, to wit:

"William Patterson, one hundred and fifty dollars; Israel Jer
son, fifty dollars; Little Johnson, sixty dollars; White Seneca, o
hundred dollars; James Young, one hundred dollars; and Silv
Smith, fifty dollars; which respective sums have been heretofo

And whereas the Senate did, by a resolution of the eleventh of
ne, one thousand eight hundred and thirty-eight, advise and
onsent to the ratification of said treaty with certain amend-
ents: which treaty so amended is word for word as follows, to
it: * * *

And whereas the Senate did, on the twenty-fifth of March, one
ousand eight hundred and forty, resolve "that in the opinion of
e Senate the treaty between the United States and the Six Nations
New York Indians, together with the amendments proposed by
e Senate of the 11th of June, 1838, have been satisfactorily ac-
ded to and approved of by said tribes, the Seneca tribe included,
d that in the opinion of the Senate the President is authorized to
oclaim the treaty as in full force and operation."

Now, therefore, be it known that I, Martin Van Buren, President
of the United States of America, do, in pursuance of the reso-
lutions of the Senate of the eleventh of June, one thousand
eight hundred and thirty-eight, and twenty-fifth day of March,
e thousand eight hundred and forty, accept, ratify, and confirm
id treaty, and every article and clause thereof.

In testimony whereof I have caused the seal of the United States
be hereunto affixed, having signed the same with my hand.

Done at this city of Washington this fourth day of April, one
ousand eight hundred and forty, and of the Independence of the
nited States the sixty-third.

M. VAN BUREN.

By the President.
[SEAL.]

JOHN FORSYTH,
Secretary of State.

XI.

The President of the United States never prescribed any time for
e removal of the claimants or any of them to the lands or any of
em set apart by the treaty of Buffalo Creek further than is shown
these findings.

Many of the Indians have protested against any removal. The
nondagas have officially declared that they would not remove,
d treaties subsequent to that of 1838 appear in the statutes in re-
tion to this subject-matter. The Tuscaroras still occupy their res-
vation in New York.

After the amended treaty had been assented to, the Senecas, the
ayugas and the Onondagas residing with them, and the Tuscaroras
ntinued to protest against the treaty, the Senecas asserting that
eir declaration of assent was invalid, and that they would never
igrate but on compulsion, and requesting (as did also some
nondaga chiefs) that no appropriation be made to carry the treaty
to effect. These protests were continued even after the treaty was
tified and until the treaty of May 20, 1842, was made. More than
e years from the ratification of the treaty of Buffalo Creek the
uscarora chiefs declared that the tribe would not part with its res-
vation nor remove from it, whatever a few individuals might do.
e Indian protests against the treaty were based upon the follow-

ing allegations: (*a*) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the pre-emption owners; (*b*) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified, the lands and improvements on the Buffalo Creek reservation, in New York, were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Alleghany reservations in New York.

XII.

Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and as shown below. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of $9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas.

XIII.

A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, to be held at Cattaraugus June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The com-

missioner also reported that he held an enrollment for two full days, but that only 7 persons requested to be enrolled for emigration, and these vouched for 5 more as wishing to go.

XIV.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wis., contained 65,540 acres, all of which has been allotted in severalty and reserved for school purposes except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty. (9 Stat. L., 955; 11 Stat. L., 663, 679; 16 Stat. L., 404.) The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

22

XV.

Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as those of the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of said lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

XVI.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in considera-

tion of certain releases of claims under the treaties of 1838 and 1842, agreed to pay and invest, and did pay and invest, for said band the sum of $256,000.

This sum of $256,000 was equivalent to $1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of $400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

XVII.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian reserve be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and allotments were made to them. After this, and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860),
23 some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

XVIII.

Of the sum of $400,000, agreed by the treaty of Buffalo Creek to be appropriated for the purposes mentioned therein, the sum of $20,477.50 was appropriated, and of this, $9,797.11 were expended, this expenditure being for the removal and subsequent care of the Indians who emigrated in 1846. Of this amount $1,034.50 were for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling; $5,800.29 for pay of agent for transportation and supplies on the way, and $2,962.32 for supplies, etc. (including $350 for medical attendance and supplies), after arrival.

The following payments were also made under the treaty:

Under article 9, $5,000 to the St. Regis tribe.

Under article 11 and Schedule C, $1,500 to William King, he having emigrated in 1846.

Under article 13, $6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.

Under article 14 and Schedule B, $125 to James Cusick, he having emigrated in 1846.

The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows,

contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to non-emigration, the Indians have received the money in New York.

XIX.

It does not appear that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of any New York Indians from Wisconsin and New York to the Kansas lands other than the Hogeboom party as hereinabove set forth.

XX.

There is evidence tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

XXI.

The following facts, agreed upon by both parties, are at their request found by the court:

It is hereby stipulated and agreed between the counsel representing the parties to this case that the court find the following statement of facts, all of which are matters of history:

First. Prior to 1786 the title to and sovereignty over the lands then occupied by the New York Indians, except as to their
24 right of possession under their Indian title, was claimed by the States of New York and Massachusetts, respectively, and on December 16, 1786, Massachusetts ceded to New York the "government, sovereignty, and jurisdiction" over the disputed territory, while "the right of pre-emption of the soil from the native Indians" was divided territorially between the two States, New York acquiring an absolute right of pre-emption in a territory which included what afterwards became known as the Oneida, Onondaga, and St. Regis reservations, and Massachusetts acquiring a similarly absolute right in the territory which included what were afterwards known as the four Seneca reservations and the Tuscarora reservation. (See stipulation, filed October 16, 1894.)

The agreement by which the said concessions were made by the said parties is contained in an instrument in writing, made and executed by and between the said States at the city of Hartford, in the State of Connecticut, on the 16th day of December, in the year of our Lord 1786, a copy of which agreement is recorded in the office of the county clerk of the county of Cattaraugus, State of New York, in Liber one, at page 270–280, to which record reference is here made, and either party is at liberty to read the whole or any part thereof on the hearing of this case. The Indian title and right of possession to a part of the said territory was afterwards bought and extinguished by certain grantees of Massachusetts in the year 1789.

The pre-emption right and estate of Massachusetts in the remaining part of these lands was granted by the said State to Robert Morris May 11th, 1791, and by him to the trustees of the Holland Land Company in the year 1793, except as to the land known as the "Morris reserve," and from time to time the Indian title as to the various tracts was extinguished by these parties. But this relinquishment of the Indian title did not include the lands and reservations occupied by the Seneca and Tuscarora Indians mentioned and referred to in the treaty of 1838.

The Tuscaroras came from North Carolina prior to the Revolutionary war and formally united themselves with the confederacy of the New York Indians, known at that time as the Iroquois Confederacy, and were assigned to and resided upon the territory of the Oneidas, and thereafter the Iroquois Confederacy became known as the Six Nations; and prior to 1788 the Tuscaroras commenced a settlement by themselves on lands which they now occupy, located in the county of Niagara, and obtained an Indian title to 1,920 acres of land from the Seneca nation of Indians and the Holland Land Company.

In 1804 the Tuscaroras purchased with their own moneys 4,329 acres of land lying adjacent to the tract of land last mentioned, and they now own and occupy the last-mentioned tract in fee-simple; and the said two parcels of land comprise the 6,249 acres of land mentioned and referred to in the 11th finding of fact in Congressional case No. 151 as being occupied by the Tuscarora Indians.

In 1810 the Holland Land Company conveyed to David A. Ogden its estate and property in the Buffalo Creek, Cattaraugus, Alleghany, Tonawanda, Tuscarora, and Canadea reservations, in all 196,335 acres, subject only to the right of the native Indians to occupy and possess the same under their Indian title.

On August 1st, 1826, the Seneca nation sold to Thomas Ludlow Ogden and others, trustees of the Ogden Land Company, the Canadea, Canawaugus, Squawky Hill, and Big Tree reservations and parts of the Buffalo Creek, Cattaraugus, and Tonawanda reservations, and surrendered possession of the same; but this sale and surrender of lands did not include any of the lands and reservations mentioned and described in the treaty of 1838 and also in the 11th finding of fact in Congressional case No. 151.

Second. The provisions of the treaty of Buffalo Creek of 1838, whereby the Tuscaroras sold to Ogden and Fellows a part (including the 1,920 acres) of their reservation and conveyed the balance to the United States in trust for sale on their account, were never followed by any surrender of possession by the Tuscareras, or payment of the purchase-money by Ogden and Fellows, or any sale of any part of the reservation by the United States, and the Tuscaroras have continued to hold and occupy their entire reservation as before described ever since. The terms and conditions of the sale to Ogden and Fellows and the object and purpose of the same are set forth in article 11 of the treaty of 1838, and the form of the deed made and executed by the Tuscaroras is attached to the said treaty of 1838 and published therewith, to which reference is here made; and said

article 14 and copy of the deeds thereto attached may be read by either party on the hearing.

Third. The Tonawanda band of the Senecas did not, on the execution of the treaties of 1838 and 1842, surrender up the possession of their reservation to Ogden and Fellows under the provisions of the treaties of 1838 and 1842, and when the said Fellows and others proceeded to dispossess one of this band of a part of the reservation an action of trespass *quare clausum fregit* was brought by the Indian sought to be dispossessed and a judgment rendered in favor of the plaintiff therein in the supreme court of the State of New York which judgment was affirmed by the court of appeals of the State of New York, and on appeal to the Supreme Court of the United States the judgment of the court of appeals of the State of New York was affirmed, and the facts and circumstances of the case are stated and set forth in the case entitled Joseph Fellows, survivor of Robert Kendle, plaintiff in error, against Susan Blacksmith and Eli S. Parker, adm'rs of John Blacksmith, deceased.

This case is reported in the 19th of Howard, page 366, to which case so reported reference is made for the facts and circumstances of the case upon which the said several judgments were based.

Fourth. The Oneidas of New York sold and conveyed to the State of New York a further portion of their lands within the State, retaining 350 acres, upon which a portion of the Oneidas now reside; and in 1848 and prior thereto a large number of the said tribe removed to the State of Wisconsin and settled upon that portion of the Green Bay lands which have been occupied by others of the tribe prior to 1838 and which was excepted from the operation of article I of the treaty of 1838.

J. E. DODGE,
Assistant Attorney General, for Defendant.
GUION MILLER,
For Claimants.

Conclusion of Law.

Upon the foregoing facts the court find as conclusion of law that the petition be dismissed.

25 IV.—*Opinion.*

DAVIS, J., delivered the opinion of the majority of the court:

What were known in 1784 as the "New York Indians" consisted of six nations or tribes, called Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, and Mohawks. The Mohaws soon after left the United States for Canada, and in 1797 relinquished by treaty all claims to land in New York. (Treaties of 1784, 1789, and 1797, Stat. L., 15, 33, 61.)

The title to the lands occupied by the New York Indians in New York was prior to 1786 claimed both by New York and Massachusetts, which agreed in 1786 that New York should exercise "government, sovereignty, and jurisdiction" of the territory, while Mass-

chusetts reserved "the right of pre-emption of the soil from native Indians" in certain named parts of the State, the right of pre-emption as to the rest of the territory being relinquished to New York. The pre-emption rights of Massachusetts were afterwards (in 1791) granted to Robert Morris and by him were transferred (except as to one tract) to the Holland Land Company.

By various treaties between the United States and the Indians the latter were secured in their right to the lands upon which they were settled and whose boundaries were fixed. In one of these treaties, that of 1794, the United States engaged that they would never claim the lands or disturb either of the Six Nations or their Indian friends united with them in the free use and enjoyment of the lands, but that the Indians should remain upon the lands until they chose to sell them to the United States, the Six Nations upon their part agreeing not to claim any other lands within the United States.

Beginning in 1810, a movement appears to have been made for the removal of the New York Indians to the northwest, and, with the approval of the United States Government, they purchased from the Menomonie and Winnebago tribes lands in Wisconsin. This transaction was completed in 1823, and thereafter some of the New York Indians removed to Wisconsin. Dispute there arising between them and the Menomonies, fresh agreements were concluded by the Government, and the Indian rights in the Wisconsin lands were recognized by the President and the Congress.

The treaty with the Menomonies, assented to by the New Yorks, provided that the lands in Wisconsin should be held under such tenure as that by which the Menomonies had before held them, "subject to such regulations and alterations of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

It therefore appears from the treaties and the findings that prior to February, 1831, plaintiffs, with the approbation of the President, had purchased from the Menomonie and Winnebago Indians some rights in land in Wisconsin, near Green Bay; that questions had arisen in relation to this purchase which were finally settled by a treaty between the Menomonies and the United States, ratified in 1832.

26 Coming now to January, 1838, we find that relatively few New York Indians had emigrated to Wisconsin; but the reasons why they had not done so were satisfactory to the President, who had the right to prescribe the time of removal. Prior to this, however, some of the New York Indians had asked that their Wisconsin lands should be taken by the Government and a new home provided for them in the West. Thereupon the treaty of January 15, 1838, known as the treaty of "Buffalo Creek," was negotiated, and after amendment by the Senate was proclaimed by the President.

Upon this treaty plaintiffs found the alleged rights which they seek to enforce here, and the claim presented, as defined by the special statute, is that of the New York Indians (being those Indians who were parties to the treaty of Buffalo Creek) against the United

States growing out of the unexecuted stipulations of said treaty on the part of the United States.

The situation when this treaty was signed was briefly this: The Indians had rights in lands in New York and in Wisconsin, and these rights had value; relatively few Indians had emigrated to Wisconsin, and the reasons for so small an emigration were satisfactory to the President; a desire had been expressed by some of the New York Indians to go west with a willingness to surrender their lands in Wisconsin for lands west of the Mississippi; the United States were glad of an opportunity to pursue their policy of moving all Indian tribes westward.

It was, therefore, in substance agreed in the treaty that the Indians cede to the United States all their rights in the Wisconsin lands (except a small reservation); that the United States set apart for them a permanent home west of the Mississippi upon a tract described by metes and bounds; this land the Indians were to hold in conformity with section 3 of the act of May 28, 1830, the tract to be divided among the different tribes, nations, or bands in severalty in proportion to population, with some special provisions as to certain tribes. The United States agreed to protect the Indians in their new home and agreed that the land "should never be included in any State or Territory of the Union." The United States agreed to pay certain sums to the different nations and tribes on their removal west. The United States agreed to appropriate $400,000 for the expenses of removal, and also to assist the Indians in various ways in beginning life in their new home.

The defendants have complied with the specific obligations assumed by them under this treaty to this extent alone. In 1846 they removed some 200 or more Indians to the new reservation (all, apparently, who wished to remove), and paid therefor the sum of $9,464.08; they allotted to 32 of these Indians 10,240 acres of land; in 1857 they secured from the Tonawanda band of the Senecas a release of all their rights under the treaty and in the lands, and paid them for this the sum of $256,000. In no other way, so far as appears, have the United States attempted to carry out their obligations under the treaty of Buffalo Creek.

We have given a concise statement of the situation existing when the treaty of Buffalo Creek was negotiated, as we understand it. Our knowledge of this situation is chiefly gleaned from treaties, their recitals, their appendices, and the official action of duly authorized agents of Government in relation to them. Some
27 further facts appear in the findings, but generally the history of the relations of these tribes to the Government and the situation, political and contractual, in 1838 is deduced from the treaties themselves and their appendices, which we will now examine more carefully.

In 1784 the United States by treaty secured the Oneida and Tuscarora nations in the possession of the lands upon which they were settled, and fixed the boundaries of the lands of the Six Nations, it being agreed by the United States that the Six Nations should

be secured in the peaceful possession of the lands they then inhabited east and north of the boundaries fixed.

The stipulations of this treaty were renewed and confirmed in 1789, when the boundary was again described in the same terms as in the treaty of 1784, and the Indians relinquished and ceded to the United States the lands west of the defined boundary. The Mohawks were not parties to the treaty of 1789.

In 1794 another treaty was concluded with the Six Nations, guaranteeing peace and friendship perpetual between the parties, acknowledging the lands reserved to the Oneida, Onondaga, and Cayuga nations in their treaty with the State of New York to be their property, engaging that the United States would never claim the same or disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof, and agreeing that the said lands should remain theirs until they chose to sell the same to the United States, who "have the right to purchase." The land of the Seneca nation is also described by metes and bounds in this treaty, acknowledged as their property, confirmed as theirs until they chose to sell to the United States, who "have the right to purchase." The United States having thus described and acknowledged the lands of the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same nor disturb the Six Nations in the free use and enjoyment thereof, the Six Nations upon their side agreed never to claim any other lands within the boundaries of the United States.

In 1830 some of the New York Indians petitioned the President for leave to purchase reservations of their Western brethren, with the privilege of removing to them and occupying them. Thereupon, with the approbation of the President, land at Green Bay, Wis., was bought by them from the Menomonies and Winnebagoes.

Eleven years later the Menomonies ceded to the Stockbridge, Tuscarora, St. Regis, and Munsee nations, for a small money consideration, two tracts of land in Wisconsin. The title to these tracts was confirmed by the President in March, 1823.

Later, Indians belonging to the Oneida, St. Regis, Munsee, and Brothertown tribes moved to the Wisconsin lands, and questions arose which resulted in the treaty of 1831.

In this treaty (7 Stat. L., p. 342) the Menomonies, after denying that they had sold any lands, make the following statement:

"For the purposes, therefore, of establishing the boundaries of their country and of ceding certain portions of their lands to the United States, and in order to secure great and lasting benefits to themselves and posterity, as well as for the purpose of settling the long-existing dispute between themselves and the several tribes of New York Indians who claim to have purchased a portion
28 of their lands, the undersigned * * * stipulate and agree with the United States as follows," etc. It will be noted that the agreement is with the United States; that any rights in the New York Indians to Menomonie lands are denied (see article I); but the Menomonies do agree, at the solicitation of the President, that such lands, within certain boundaries, as he may

direct, "may be set apart as a home to the several tribes of the New York Indians who may remove to and settle upon the same within three years from the date of this agreement." Further on in the same article occurs this paragraph:

"The country ceded to the United States for the benefit of the New York Indians contains by estimation about 500,000 acres. * * * As it is intended for a home for the several tribes of the New York Indians who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time. * * * And if at the time of such apportionment any lands should remain unoccupied by any tribe of New York Indians, such portion as would have belonged to such Indians had it been occupied shall revert to the United States. * * * It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes under such tenure as the Menomonie Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

For this "cession to the United States for the benefit of the New York Indians" the sum of $20,000 was to be paid. It was also stipulated that such part of the treaty as relates to the New York Indians should be immediately submitted to them, and if they refused to accept the provision made for their benefit and to move to the lands set apart for them on the west side of Fox river, that their immediate removal from the Menomonie country be directed. (*Ibid.*, p. 345.)

Nine days later (February 17, 1831) an amendment to the treaty was signed, induced by certain reasons, one of which was "to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States;" so it was agreed that such part of the first article of the treaty as limits the removal and settlement of the New York Indians to three years shall be altered so that the President shall prescribe the time for removal and settlement. No limit is put upon that time.

To the arrangement made by this treaty the New York Indians assented, and thereafter the title to the land described in the treaty has been thus recognized by the Congress and the President as in the New York Indians: in the treaty with the Menomonies of September 3, 1836; in the treaty with the Stockbridges and Munsees of September 3, 1839, and in the treaty with the Tonawanda band of Senecas of November 5, 1857.

It therefore appears that prior to February, 1831, the plaintiffs, with the approbation of the Government, had in legal effect purchased from the Menomonie and Winnebago Indians certain rights in Wisconsin lands; that questions had arisen between them and the Menomonies which were finally settled by a treaty between the Menomonies and the United States, ratified in 1832; that this

29 treaty contained a provision securing to the New York Indians, in consideration of $20,000, paid by the United States, 500,000 acres of land at Green Bay, on condition that they should remove to the same within three years or such reasonable time as the President of the United States should prescribe; and the United States set apart out of another tract of land, acquired by the same treaty, three townships for the Stockbridge, Munsee, and Brothertown tribes. It further appears that in January, 1838, no substantial number of the plaintiffs had removed to the Wisconsin lands, but they had been prevented from doing so by reasons accepted as sufficient by the President. (Treaty of 1838, vol. 7, Stat. L., p. 550.) Prior to this date, however, some of the New York Indians had applied to the President to take their Green Bay lands and provide them a new home in the Indian Territory. Pursuing the Government policy in removing the Indians to the west of the Mississippi, the President acted upon this application; the treaty of Buffalo Creek, dated January 15, 1838, was signed, and after amendment was consented to and proclaimed.

The treaty of Buffalo Creek provides (in consideration of certain premises and of the covenants contained, in the treaty itself, to be performed by the United States) that the New York Indians cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First. To set apart as a permanent home for the plaintiffs a certain tract of country west of the Mississippi river (described by metes and bounds), to include 1,824,000 acres of land, to be held in fee simple by the said tribes or nations of Indians by patent from the President of the United States, in conformity with the provisions of section 3 of the act of Congress of May 28, 1830, entitled "An act to provide for an exchange of lands with the Indians residing in any of the States and Territories and for their removal west of the Mississippi, the same to be divided among the different tribes, nations, or bands in severalty," it being understood that the said country was intended as a future home for the following tribes: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns; and was to be divided equally among them, according to the number of individuals in each tribe (as set forth in a schedule annexed to the treaty and designated as Schedule A), on condition that such of the plaintiffs as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. The following is the Schedule A:

Census of the New York Indians as Taken in 1837.

Number residing on the Seneca reservations:

Senecas	2,309
Onondagas	194
Cayugas	130
	2,633
Onondagas at Onondaga	300
Tuscaroras	273
St. Regis in New York	350
Oneidas at Green Bay	600
Stockbridges	217
Munsees	132
Brothertowns	360

30 Second. The United States agreed to protect and defend the plaintiffs in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to plaintiffs by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of Indians hereinafter mentioned, on their removal west, the following sums, respectively, namely: To the St. Regis tribe, $5,000; to the Seneca nation, the income annually of $100,000, being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States; to the Cayugas, $2,500 cash and the annual income of $2,500; to the Onondagas, $2,500 cash and the annual income of $2,500; to the Oneidas, $6,000 cash, and to the Tuscaroras, $3,000.

Fifth. The United States agreed to appropriate the sum of $400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the plaintiffs in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils and in acquiring a knowledge of the mechanic arts. By supplemental article the St. Regis Indians assented to the treaty adding this stipulation, viz:

"And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove."

The treaty of January 15, 1838, as amended by the Senate June 11, 1838, was assented to September 28, 1838, by the Seneca tribe of New York Indians; August 9, 1838, by chiefs of the Oneida tribe;

August 14, 1838, by the Tuscarora nation residing in New York; August 30, 1838, by Cayuga Indians residing in New York; October 9, 1838 (with the reservation above noted), by the St. Regis Indians residing in New York; August 31, 1838, by the Onondaga tribe of Indians on the Seneca reservations in the State of New York.

The date of the acceptance of the treaty as amended by the Senate June 11, 1838, by the following tribes: Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, Brothertowns, does not appear, but the court is of opinion, and so holds, that they did accept, and this for the following reasons:

The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty with the Senate amendments be submitted and explained to each of the tribes or bands separately and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it and the President should thereupon make a proportionate reduction from the $400,000 fund and the quantity of land provided for west of the Mississippi. Later when the treaty was again before the Senate, a resolution was passed which in substance provided that when the President should
31 be "satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty" with the New York Indians according to the first resolution, then the President might proclaim the treaty and carry it into effect. It is apparent at this point that, except the Senecas, all the New York Indians, in the Senate's opinion, had assented to the amended treaty. This second resolution was adopted March 2, 1839. A year later (March 25, 1840) the Senate passed this resolution:

That in the opinion of the Senate the treaty between the United States and the Six Nations of the New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to, approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation.

Thereupon followed the President's proclamation, wherein we find the following recitals:

Whereas a treaty was made and concluded at Buffalo, * * * by * * * a commission on the part of the United States and the chiefs, head men, and warriors of the several tribes of New York Indians assembled in council; and whereas the Senate did * * * advise and consent to the ratification of said treaty with certain amendments; * * * and whereas the Senate did (pass the resolution of March 25, 1840 (*supra*)): Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do (pursuant to the two Senate resolutions (*supra*)) accept, ratify, and confirm said treaty, and every article and clause thereof, * * * (dated April 4th, 1840).

It therefore appears that the question of assent on the part of all

the parties was maturely considered by the treaty-making power at the time, and that power in both its branches was convinced, and so decided, that all the New York Indians had assented to the treaty as amended. Behind that authoritative decision we are not disposed to look, even if we have the power to do so.

That we have not the power has already been thus decided:

An objection was taken on the argument to the validity of the treaty on the ground that the Tonawanda band of the Seneca Indians was not represented to the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is that the treaty, after being executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress. (Fellows *v.* Blacksmith, 19 Howard, p. 372.)

Further, the United States, having decided that the treaty was properly executed, cannot now say, in this action, that the Indians did not assent to it.

While this treaty of 1838 was being negotiated the Six Nations had a valuable interest of some kind in many acres of land in the State of New York. The nature of this interest is not important in this case; it is enough for our purposes that it had value.

The Indians had also an interest in lands in Wisconsin, the technical legal character of which it may be difficult to define in the language of the common law, but which afforded substantial consideration for any contract with the Government.

It does not seem to us necessary to examine the quality or value of their rights in these lands. This question of the Indian tenure has been so frequently the subject of judicial, legislative, and
32 executive consideration and determination that we can subserve no useful purpose by re-examining and discussing it. Sufficient for the purpose of this action is it that the Indians had substantial rights to barter in any contract they might make with the Government in regard to the surrender of any part of their tenure and in agreeing to move west of the Mississippi and to surrender their Wisconsin rights the Indians furnished a sufficient consideration for the contract of 1838. That agreement is sustained as a valid agreement, having all the necessary elements of a binding contract. It has long been decided that treaties between the Government and the Indians are to be treated as contracts. (Foster *v.* Neilson, 2 Peters, p. 314; Head-money cases, 102 U. S., p. 540.) The amount and sufficiency of the consideration it is no part of our duty to consider. We should not and we cannot decide whether the bargain was more advantageous to the plaintiffs or to the defendants. No fraud is shown by the plaintiffs, nor undue influence, nor intimidation, nor mistake. It only remains for us to see whether any rights secured by the treaty have been violated.

We reach now the main point in this litigation, which substantially turns upon the duties imposed by the provisions of the treaty which set apart certain lands in Kansas for plaintiffs, to be divided equally among them, according to a certain schedule, on condition

that such of them as shall not accept and agree to remove to the country set apart for them within five years, or such other time as the President may from time to time appoint, shall forfeit to the United States all interest in the lands set apart; upon the provisions which contain an agreement that the United States shall protect and defend the plaintiffs in their new homes, and secure their right to establish their own government, and upon the provisions which stipulate that the Kansas lands secured by the treaty shall never be included in any State or Territory of the Union; upon the provisions which promise to pay a certain fixed sum to each of several of the tribes on their removal west, and to appropriate $400,000 to be applied to aid plaintiffs in removing, to support them for a year after removal, and to aid them in various ways.

The President has fixed no time for removal; few of the Indians have been removed; the lands secured to plaintiffs by the treaty have become part of the State of Kansas, turned into the public domain, surveyed and sold, and a small part only of the appropriation of $400,000 has been made.

There was one exception to this general statement: In 1845 Abram Hogeboom represented to the Government that a number of the New York Indians desired to remove to the Kansas lands. To aid in the accomplishment of this wish Hogeboom was appointed special agent of the Government. He reported 271 as mustered for emigration. Some of these did not leave New York, and 191 only arrived in Kansas. This was in June, 1846. Later, 17 other Indians arrived; 62 Indians are known to have died and 17 to have returned to New York. Of all these Indians, only 32 received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty of Buffalo Creek, the allotment being at the rate of 320 acres each, or 10,240 acres in all.

The Kansas lands then have been sold or otherwise disposed of by the Government for a consideration, and the Tonawanda
33 band of the Senecas alone of all the New York Indians have received money compensation for a failure, real or alleged, on the part of the United States to fulfill their part of the contract of 1838. To that band has been paid by direction of the Congress a considerable sum upon the consideration of the release by them of claims upon the United States to the lands west of the State of Missouri, of all claim and right to be removed thither, for support and assistance after removal, and all other claims against the United States under the treaties of 1838 and 1842. In addition to this payment to the Tonawandas, $9,464.08 was expended in the removal to Kansas of the two hundred or so Indians above mentioned, and the substantial result of the transaction is that the New York Indians remain in New York; that they have lost the Kansas lands, and have received from the defendants in this action, The United States, some lands in Wisconsin, the sum paid the Tonawandas, the sum paid in the removal of the Hogeboom band, and the relatively small grants in Kansas.

It is contended that the Indians by their quiescent attitude in not demanding a transfer west, or in the active opposition of the tribes

to such a transfer, have forfeited any rights they may have had in the Kansas lands. Upon the following article of the treaty this contention substantially rests:

Article 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States. (7 Stat. L., p. 552.)

The emigration west was to take place within five years, or such other time as the President might appoint, and might appoint not at any fixed period, not once for all, but "from time to time." The intent, then, of the article was not that there should be a wholesale emigration of the tribes, but that the emigration should occur at convenient periods, in such way as the President, in his wisdom, might see fit to direct, either within five years or later. The subject-matter of the removal was left to the discretion of the President, and this discretion was not limited to a period of five years, nor to any other period. As to this nothing can be said which would be clearer than the words of the treaty, "agree to remove * * * within five years, or such other time as the President may from time to time appoint."

It therefore seems to us unimportant when the five years began to run, but as matter of interest it may be noted that the treaty was first proclaimed April 4, 1840. It was afterwards amended and again proclaimed August 26, 1842, while prior to November 24, 1845, some of the Indians had applied to the War Department, under whose care they then were, for the proper steps to be taken for their emigration. Prior to November, 1845, the department had not deemed it expedient to enter into any arrangement for this purpose nor until it was assured that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

The treaty of 1838 was designed to release the eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites. The Wisconsin lands were becoming a
34 matter of concern to the Government in the face of emigration westward, and until the Indian tenure (whatever may have been its quality) was extinguished these lands were debarred from settlement. In the removal of the Indians west the defendants had a political and no financial interest, for they had no property rights in the plaintiffs' New York lands and acquired none.

It was the right of the Government, given it expressly by treaty, to cause the Indians' removal; but it never attempted to enforce that right either by fixing a time for removal or by fulfilling the obligation imposed upon them by the fifteenth article, to appropriate $400,000 to be applied by the President for certain purposes, the first of which was, "to aid them (the Indians) in removing to their homes and supporting themselves the first year after their removal." Many of the Indians did not wish to go to the new country; it may be assumed that without Government aid, by way not only of

money but in counsel and leadership, they could not go; it may well be doubted whether these Indians had a right to make the pilgrimage to Kansas by their own initiative, without the President's permission, and without the protection and care of Government agents. The duty of protection was imposed upon the Government, the relations were those of a superior to an inferior, the parties were not on equal footing, "and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws." (Choctaw Nation *v.* United States, 119 U. S., pp. 27, 28, and cases cited.)

We have already seen that the Supreme Court holds that no time was fixed for removal (Fellows *v.* Blacksmith, *supra*), where the court said: "We hold that the performance of the conditions of the treaty was not a duty that belonged to the grantees, but to the Government under the treaty."

It is urged that under the third article (of the treaty of 1838) the action, or rather nonaction, of the Indians had worked a forfeiture of their Kansas interests. That article provides that those tribes who do not "accept and agree" to remove, and to remove within five years or such other time as the President may from time to time appoint, shall forfeit all interest in the lands. If we are to be purely technical, then there is no forfeiture, for two reasons: First, that all the tribes agreed to the treaty, hence all accepted it and agreed to remove; and, second, the President has not yet fixed any time or times for such removal. Beyond this, however, is the other point that article 15, which should be read with article 3, (as it relates to the same subject-matter), requires the United States to provide the funds for this wholesale removal, which they have never done in sufficient amount.

A forfeiture at most could be only based upon a refusal by the Indians to emigrate, and we do not find that such a refusal was affirmatively made, although undoubtedly and naturally there was a strong disinclination on the part of the Indians to leave their New York homes for a distant and unknown country. "An interpretation which creates a forfeiture is not to be favoured" (Jackson *v.* Toppin, 1 Wendell, p. 388), and especially where a party to an agreement for an exchange of lands has secured the first possession of the premises assigned to him in the contract. (1 Barbour, p. 634.)

The Government could have enforced the removal; but it not only took no step to that end, but failed to provide the means required of it by the treaty to pay for the removal; it has been quiescent, tacitly assenting to the existing conditions, and the Indians have not urged a removal.

When this action was begun, and for years before, the United States were unable by reason of their own acts to carry out the agreement of 1838. The Government had disposed of the lands in Kansas; these have for many years been occupied by settlers, and villages and towns have sprung up upon them. Under such circum-

stances any formal demand at this time by the Indians for a return of the Kansas lands would be a vain and useless form. The lands they can never recover, and to them the Indians can never be removed. Their only remedy is in a money judgment if they have been wronged. The value of the land as fixed in that treaty we have found as the reasonable value in this case.

As any rights to be enforced in this action rest principally upon the treaty of Buffalo Creek we must consider that instrument somewhat more fully.

As to the parties to the treaty some question has been made. In the amendments to the treaty made by the Senate July 11, 1838, the Indians are spoken of as "the New York Indians of the several tribes described in the foregoing article" and the tribes described in the "foregoing article" (the third article) are the "several tribes described in the foregoing article," to wit, the second article. Turning now to the second article we find the grant to be to "all the New York Indians now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes" and the article thus concludes:

It is understood and agreed that the above-described country (the Kansas lands described as situated directly west of the State of Missouri) is intended as a future home of the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, residing in the State of New York and the same to be divided equally among them according to their respective numbers, as mentioned in a schedule hereto annexed.

Further on in the treaty we find special provisions made for the following tribes or special mention made of them, to wit: The Oneidas, Senecas, St. Regis, Cayugas, Onondagas residing on the Seneca reservation, Oneidas residing in the State of New York, and the Tuscaroras, while the treaty is signed by representatives of the following tribes: Senecas, Tuscaroras, Oneidas residing in the State of New York for themselves and their parties, Oneidas at Green Bay, St. Regis, Oneidas residing on the Seneca reservation, principal Onondaga warriors in behalf of themselves and the Onondaga warriors, Cayugas, principal Cayuga warriors in behalf of themselves and the Cayuga warriors; and in the census annexed to the treaty (as Schedule A) are named the Senecas, Onondagas, Cayugas, Onondagas at Onondaga, Tuscaroras, St. Regis in New York, Oneidas at Green Bay, Oneidas in New York, Stockbridges, Munsees and Brothertowns, while Schedule C is applicable only "to the Onondagas and Cayugas residing on the Seneca reservations."

36 Later (February 13, 1838, 7 Stat. L., 561) the St. Regis Indians "having heard a copy of said treaty (of Buffalo Creek) read by Ransom H. Gillet, the commissioner who concluded that treaty on the part of the United States, and he having fully and publicly explained the same * * * the St. Regis who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same."

August 9, 1838, "the undersigned chiefs of the Oneida tribe of

New York Indians" gave their free and voluntary assent to the treaty of Buffalo Creek "as amended by the resolution of the Senate of the United States on the eleventh day of June, 1838."

In the following autumn (September 28, 1838) the "chiefs of the Seneca tribe of New York Indians residing in the State of New York" "gave their free and voluntary assent to the foregoing treaty (of Buffalo Creek) as amended by the resolution of the Senate of the United States on the eleventh day of June, 1838, and to our contract therewith." (7 Stat L., 561.)

Similar consents appear in the statutes (7 Stat. L.) as given by the "sachems, chiefs, and head men of the Tuscarora nation of Indians residing in the State of New York" (*ibid.*, p. 563); by "the chiefs and head men of the tribe of Cayuga Indians residing in the State of New York" (*ibid.*); by the "sachems, chiefs, and head men of the 'American party' of the St. Regis Indians residing in the State of New York," who prefaced their assent with this condition: "The St. Regis Indians shall not be compelled to remove under the treaty or amendments" (dated October 9, 1838, *ibid.*, p. 564), and (August 31, 1838) by the "chiefs, head men, and warriors of the Onondaga tribe of Indians residing on the Seneca reservation in the State of New York."

We thus find specifically mentioned in the treaty or in its appendices the following Indian tribes: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation: Oneidas, St Reges, St. Regis in New York, the American party of the St. Regis, residing in the State of New York: Stockbridges, Munsees, Brothertowns.

It appears, then, as a fact that the Indians had full notice of the treaty and assented to it, thus supporting the conclusion reached by the President and the Senate, a conclusion which, as we have stated, is conclusive upon us.

It is argued in substance that the payment by authority of Congress of a considerable sum of money to the Tonawanda tribe involves some admission by the defendants of plaintiff's position and is in effect an acknowledgment of a right which would lead to plaintiff's recovery in this cause.

Legislative action is not necessarily a precedent for judicial action, for the legislature has a different quality of responsibility and power from the courts. The Congress may correct injustice in a manner entirely without judicial jurisdiction and this right it often exercises. We, however, are limited in this case to the grant of jurisdiction given by the special act. Beyond that we
37 can in no event go. If that act fail to give us sufficient power to remedy a wrong (if one has been done) and to remedy it by judicial method, recourse must again be had to the legislature.

The Tonawanda appropriation may have a bearing upon the con-

struction of the jurisdictional act if that act be obscure, but it does not necessarily show that because the Congress believe the Tonawandas deserved indemnity therefore the other tribes did so equally deserve it. Such an inference is, indeed, negatived by the fact that the Congress while compensating the Tonawandas failed to make any payment to the plaintiffs herein and sent them twice to this court (under different grants of jurisdiction) to prosecute their alleged rights—all this long after the Tonawanda appropriation had been made. The differing action of the Congress in the two cases (this case and that of the Tonawandas) shows that body to have been convinced that the Tonawandas were injured and not to have been convinced that these plaintiffs were injured. As to that the Congress preserved an "open mind." In the solution of that question they have invoked judicial aid.

There is a difference in the cases, however, to which as a matter of speculative interest it may be well to refer for it may have had its influence upon the course pursued.

The treaty of 1842 (7 Stat L., 588) between the United States and the Senecas embodies what is therein called an indenture between Thomas Ludlow Ogden and Joseph Fellowes and the chiefs and head men of the Seneca nation of Indians. In the second article of this indenture the Senecas grant to Ogden and Fellowes, in consideration of certain agreements on their part, "the whole of the said two tracts of land severally called the Buffalo Creek reservation and the Tonawanda reservation and all the right and interest therein of the said nation." In the third article it is stipulated that for "the sale and release of the said four tracts of land there shall be paid to the said nation a just consideration sum for the release of the two tracts hereby confirmed to the said Ogden and Fellowes, to be estimated and ascertained as follows." Briefly, the value of the Indian title and improvements was estimated at $202,000, of which $100,000 was fixed as the value of the title to the four tracts, excluding improvements, and $102,000 was fixed as the value of the improvements on them; of this Ogden and Fellowes were to pay to the Senecas "such proportion as the value of all the lands within the said two tracts called the Buffalo Creek and Tonawanda reservations shall bear to the value of all the lands within all the said four tracts," with a similar provision as to the money paid for improvements; the amount of the consideration moneys (article IV) to be determined by arbitrators, one to be named by the Secretary of War and one by Ogden and Fellowes, who were also to award the amount to be paid to each individual Indian "out of the sum which, on the principles above stated, they shall ascertain and award to be the proportionate value of the improvements on the said two tracts called the "Buffalo Creek reservation and the Tonawanda reservation;" provision is made for an umpire. The arbitrators' report is to be made in duplicate, one is to be filed "in the office of the Secretary of the Department of War," the other given to Ogden and Fellowes. In the fifth article it is agreed that possession of the forest or unimproved portion of the land shall be given to Ogden and Fellowes within a certain time after the arbitrators' report had been

filed and of the improved portion within two years thereafter: "Provided always, that the amount to be so ascertained and awarded as the proportionate value of the said improvements shall, on the surrender thereof, be paid to the President of the United States, to be distributed among the owners of the said improvements, according to the determination and award of the said arbitrators, in this behalf: And provided further, that the consideration for the release and conveyance of the said lands shall, at the time of the surrender thereof, be paid or secured to the satisfaction of the said Secretary of the War Department, the income of which is to be paid to the said Seneca Indians annually," and the article concludes with a provision for individual Indians surrendering land and improvements prior to two years. The sixth article relates to Indians desiring to remove from the State of New York "under the provisions of any treaty, made or to be made," and that the interest or income of their share of the said funds, etc., shall be paid to the Indians in their new homes, and there are provisions as to any future sale of the Cattaraugus and Allegany tracts.

Defendants' counsel argues that the Tonawandas refused to allow the appraisal to be made, and this appraisal was a duty which fell upon the Government, not Ogden & Fellowes; this the Supreme Court have decided (Fellowes *v.* Blacksmith, 19 How., 366–372); it then should have been speedily performed to enable the Tonawandas to emigrate west, had they so desired; "hence, the United States could not, as against them, claim their share of the land in the West or of the fund of $400,000 on account of their non-removal within that period. The Tonawandas had, therefore, a right, even in 1857, under the treaties of 1838 and 1842, to call upon the United States to aid in their removal to the Kansas lands, and to perform its other obligations as to their settlement there, or else to compromise for a reasonable sum. The latter course was adopted, and full satisfaction made for the error of judgment on the part of the United States."

Whether this argument be sufficient or not we need not determine; sufficient is it for us that the Congress paid the Tonawandas and did not pay the other New York Indians, but sent them here under the act of January 28, 1893, wherein is found no admission of any Indian rights. This is the governing clause of that act:

That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the fifteenth of January, eighteen hundred and thirty-eight, against the United States growing out of the alleged unexecuted stipulations of said treaty on the part of the United States.

This, with a waiver of the statute of limitations, is the grant of jurisdiction. No specific mention or exception is made of the Tonawandas, and we can only infer that the Congress found a reason for paying them which does not exist as to the other Indians.

This case has a complicated look at first, for the record is full of petitions and other documents relating to a discussion which began

many years ago; in fact the question is a simple one when extraneous matter is stripped from it.

In the first place it is to be kept clearly in sight, that for the promises contained in the treaty of Buffalo Creek the United
39 States were to receive from the Indians no consideration in money or New York land, and (except in the slight emigration west above described) have received no consideration whatever from the Indians.

The defendants' motive for the treaty was political. They wished the plaintiffs to move west. The plaintiffs have not moved west and defendants have failed in their purpose. This is the substantial condition today, for the slight and unimportant Hogeboom party may be eliminated from the transaction, as the movement simply shows, first, that some few Indians were willing to go to Kansas and were taken to Kansas by the Government, whence many of them returned; second, that the mass of the Indians wished to remain in New York, or at least evinced no desire to leave it.

The search for facts in this case has been somewhat beclouded by the movements of small parties or by the action of individuals of a race not familiar with governmental methods, which did not have adequate form of political expression, and which was temporarily influenced by the greater sagacity of the white men with whom they dealt. By this we do not mean to intimate that they were improperly influenced or influenced by unfair means. The main and important object of the defendants was to move the Indians west before the advancing wave of Anglo-Saxon civilization, and the endeavor to accomplish this object (believed to be beneficent for all parties) led, first, to the grant of the Wisconsin lands; that experiment having slight success, a second effort was made in 1838 with the Kansas lands, and that substantially failed.

The principal facts are that the Indians did not wish to go west, the Government did not force them to do so, and they are in New York today. Some individuals or bands went to Wisconsin or Kansas, but of them there is no question here, for they received land as promised. The treaty with the Menomonees promised Wisconsin lands in return for emigration; the treaty of Buffalo Creek promised Kansas lands for emigration; but the New York Indians did not emigrate, and of the New York lands the Government of the United States never received from the Indians an acre, and as the Indians did not leave the State the United States has received no substantial benefit from the plaintiffs and no money value whatever.

When it is remembered (and this must be remembered) that the United States did not acquire the New York lands, nor wished to do so; that it never was intended (except through Indian emigration westward) that the United States should ever receive anything by way of consideration for the treaty of Buffalo Creek, much of the difficulty which seemed to surround this case disappears.

The land in New York was disposed of through the States of New York and Massachusetts in negotiation with the Indians; in these transactions the United States was in any way only indirectly interested and not at all financially interested. The Indian lands in

New York did not come into the possession of the United States under the treaty of 1838 or otherwise, and it was never intended that they should do so.

The Buffalo Creek treaty has vanished, leaving no rights or duties behind it in so far as this litigation is concerned. It said in substance to the Indians: If you wish to go west notify us and we will take you and provide for you; or, to take the other argument, it empowered the President to order the Indians west if he deemed it wise to do so.

40 The few Indians who wished to go to Kansas were taken there and given their land, upon which they did not care to remain, and no more Indians tried to follow them. The Indians who wished to go to Wisconsin were there given lands as promised.

The whole transaction, set forth in this opinion and in the findings, was simply an endeavor on the part of the United States to move the Indians out of New York, and this endeavor failed for the one reason that the Indians did not wish to go—and they did not go. Except for the slight emigration to Wisconsin and the still slighter one to Kansas, where, in both instances, the Indians received their lands, there was no desire shown to leave New York.

The treaty failed. It was not rescinded; it was not violated; but it did not accomplish its full purpose. It did not remove the tribes west, but it removed as many of the Indians as wished to go—a very insignificant minority.

Perhaps the President had the power and technical right under the treaty of Buffalo Creek to surround the Indians with troops and force them away from their homes against their will, but it was not a power he must use, and it was not a power which the Indians wished him to use.

It cannot be doubted that if the plaintiffs in this action really wished to avail themselves of the treaty grants the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. But the Government was not prepared to resort to harsh measures, or, against his will, to drive the Indian from his home, so it made a bargain with him in 1838, and that bargain it fulfilled in moving the Hogeboom party, for in doing this it moved all the Indians who then or since (so far as is shown) have ever wished to leave New York for the Kansas lands.

This is not a case in which the Indian has been harshly treated, where his rights have been invaded, or where he has been sacrificed to the Caucasian. On the contrary, he appears to have received the greatest forbearance; in the face of advancing white settlement he has been allowed by the United States to make his own terms with the States and with the land companies or their representatives or assignees, and he has been allowed to remain at home, while provision was made both in Wisconsin and Kansas for his removal westward had he wished to leave New York.

As to the character of the transactions which lead to the sale of the lands in New York we have nothing to do further than to note that the United States Government was not a party to them, except

in one case where it in terms affirmed an arrangement made with Ogden and Fellowes (acting under State authority) by the Indians.

We have no reason to doubt that the United States took to Kansas all the Indians who wished to go there, and thus substantially fulfilled their share of the contract. Some Indians went to Wisconsin, as they had a right to do, and there received land as was promised. The mass of the Indians remained in New York, as they preferred to do and as they had a right to do, and sold their lands or now remain upon them.

The United States took from the Indians no lands in New York; they offered lands in Wisconsin and Kansas, and so far as the Indians wished it they were moved to those lands and took possession of them.

41 The purpose of the United States in negotiating the treaty of Buffalo Creek has substantially failed, but plaintiffs have not been injured by that failure, for the Government (it seems to us) has fulfilled any obligation imposed upon it by the treaties with the New York Indians so far as the Indians permitted. The whole transaction has been for many years closed; there is shown in this record no reason for reopening it.

Upon the whole case it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek, but as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfillment and preferred the then existing situation—no damage to either side can be said to have been inflicted. This conclusion, if it be correct, eliminates the treaty of 1838 from the discussion and brings us to a consideration of the relations and obligations of the parties prior to the conclusion of that agreement.

So far as this action is concerned the rights of the Indians prior to the treaty of 1838 were fixed and defined by the treaty with the Menomonees dated February 8, 1831 (7 Stat. L., 342).

One of the considerations of the treaty was stated in the preamble to be to settle "the long-existing dispute between themselves and the several tribes of the New York Indians, who claim to have purchased a portion of their lands;" and the following provisions upon that subject are found in the instrument:

The Menomonees protest—

That they are under no obligation to recognize any claim of the New York Indians to any portion of their country; that they neither sold, nor received any value, for the land claimed by these tribes; yet at the solicitation of their Great Father, the President of the United States, and as an evidence of their love and veneration for him, they agree that such part of the land described, being within the following boundaries, as he may direct, may be set apart as a home to the several tribes of the New York Indians, who may re-

move to and settle upon the same, within three years from the date of this agreement, viz: (Here is a description of the New York Indian land, as well as of land for a military reservation, etc.) The country hereby ceded to the United States, for the benefit of the New York Indians, contains by estimation about five hundred thousand acres, and includes all their improvements on the west side of the Fox river. As it is intended for a home for the several tribes of the New York Indians who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time, so as not to assign to any tribe a greater number of acres than may be equal to 100 for each soul actually settled upon the lands, and if, at the time of such apportionment, any lands shall remain unoccupied by any tribe of the New York Indians, such portion as would have belonged to said Indians, had it been occupied, shall revert to the United States. That portion, if any, so reverting, to be laid off by the President of the United States. It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall, from time to time, think proper to adopt.

For this cession the United States, "for the benefit of the New York Indians," "consented" to pay to the Menomonees $20,000, in four installments of $5,000 each.

42 In the sixth article of the same treaty (with the Menomonees, 1831; 7 Stat. L., 342) the Menomonee chiefs request the President that such part of the treaty as relates to the New York Indians—

be immediately submitted to the representatives of their tribes. And if they refuse to accept the provision made for their benefit, and to remove upon the lands set apart for them on the west side of the Fox river, that he will direct their immediate removal from the Menomonee country; but if they agree to accept of the liberal offer made to them by the parties to this compact, then the Menomonee tribe as dutiful children of their Great Father, the President, will take them by the hand as brothers, and settle down with them in peace and friendship.

An article supplementary to this treaty was agreed to by the United States and the Menomonees, February 17, 1831 (7 Stat. L., 346), the preamble of which states that it has been represented—

That it would be more desirable and satisfactory to some of those interested that one or two immaterial changes be made in the first and sixth articles, so as not to limit the number of acres to 100 for each soul that may be settled upon the land when the President apportions it, as also to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States.

To accomplish these objects the first article provides that such part of the first article of the treaty of February 8, 1831, as limits the removal and settlement of the New York Indians upon the Wisconsin lands shall be altered and amended so as to read as follows:

That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just. And if, within such reasonable time, as the President of the United States shall prescribe for that purpose, the New York Indians shall refuse to accept the provisions for their benefit, or having agreed, shall neglect or refuse to remove from New York, and settle on said lands, within the time prescribed for that purpose, that then, and in either of these events, the lands aforesaid shall be, and remain the property of the United States, according to said first article, excepting so much thereof, as the President shall deem justly due to such of the New York Indians as shall actually have removed to, and settled on the said lands. Second, it is further agreed that the part of the sixth article of the agreement aforesaid, which requires the removal of those of the New York Indians, who may not be settled on the lands at the end of three years, shall be so amended as to leave such removal discretionary with the President of the United States. The Menomonee Indians having full confidence that in making his decision he will take into consideration the welfare and prosperity of their nation. (See also note on p. 347, 7 Stat. L.)

This, then, opened the Menomonee lands to New York Indian settlement during the pleasure of the President, and some of the New York Indians have settled there.

The situation as to the Wisconsin lands does not seem to us to differ in principle from that of the Kansas lands. They were opened to the defendant Indians for a small money consideration paid by the United States to the Menomonees. Some New York Indians went there, took up the lands, and lived there. The others were free to go, but did not wish to do so; in fact, so averse were they to such an emigration that the Government was led to the endeavor to move them to Kansas formulated in the treaty of Buffalo Creek, which attempt also failed, leaving the Indians in the State of New York, where most of them are today. The Indians who went to Wisconsin, equally with the few who went to Kansas, received the land promised them; the others preferred to remain at home and sell their New York lands.

There is no reason to apply in this case with any strictness the general principles governing the relations of guardian and ward, which usually much affect the decision of cases between the Indian tribes and the Government, for the plaintiffs herein have been treated with kindness and consideration, and have in no way been injured or disturbed in their rights and privileges.

Petition dismissed.

43 V.—*Judgment of the Court.*

THE NEW YORK INDIANS
v.
THE UNITED STATES. } 17861.

At a Court of Claims held in the city of Washington on the sixth day of January, A. D. 1896, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimants, the said New York Indians, be dismissed.

BY THE COURT.

44 VI.—*Application of Claimants for and Allowance of Appeal.*

THE NEW YORK INDIANS
v.
THE UNITED STATES. } 17861.

From the judgment rendered in the above-entitled cause on the 6th day of January, A. D. 1896, in favor of the defendants, the claimants, by Guion Miller, their attorney of record, on the 15th day of January, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

GUION MILLER,
Att'y of Record for Claimants.

Filed and allowed in open court on the 15th day of January, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

45 In the Court of Claims.

THE NEW YORK INDIANS
v.
THE UNITED STATES. } 17861.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 22d day of January, A. D. 1896.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,154. Court of Claims. Term No., 864. The New York Indians, appellants, *vs.* The United States. Filed January 22d, 1896.

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